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Supreme Court of the United States

OCTOBER TERM, 1937

No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,
PETITIONER,

versus

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

MOTION OF UNIVERSITY OF SOUTH CAROLINA, CLEMSON COLLEGE AND THE CITADEL FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE

E. W. MULLINS,
HAROLD MAJOR,
D. W. ROBINSON, JR.,
JAMES F. DREHER,
Counsel for University of South Carolina, Clemson College and The Citadel, as *Amici Curiae*.

Petition Filed

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REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

May it please the Court:

The undersigned as counsel for the University of South Carolina, Clemson College and The Citadel, respectfully move this Honorable Court for leave to file the accompanying brief in this cause as *amici curiae*.

E. W. MULLINS,
HAROLD MAJOR,
D. W. ROBINSON, JR.,
JAMES F. DREHER,
Counsel for University of South Carolina, Clemson College and The Citadel, as *Amici Curiae*.

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Supreme Court of the United States

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REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

BRIEF OF UNIVERSITY OF SOUTH CAROLINA, CLEMSON COLLEGE AND THE CITADEL AS AMICI CURIAE

PRELIMINARY STATEMENT

The institutions submitting this brief as *amici curiae* are State institutions of higher learning of the State of South Carolina and have an interest in the case now before this Court. Although the relation between the Athletic Departments of these institutions and the governing bodies of the schools and the relation between the governing bodies of the schools and the State Government are different in some particulars from the comparable relations existing in our sister State of Georgia, our situation is in the main so similar to that presented by the record before the Court as to permit us to adopt in its entirety the legal position assumed in this matter of Federal taxation on admissions to inter-collegiate football games by appellees. We of course

have no interest in the procedural questions presented in this writ of *certiorari,* but the determination of the primary question as to whether the Federal Government can impose and collect taxes on admissions charged to athletic contests by State institutions is of vital interest to us. If this Court should reverse the holding below and require the collection and payment of these taxes by the institutions in Georgia, we should be compelled to place ourselves within the terms of the Federal Revenue Act and pay similar admission taxes to the Collector of Internal Revenue in respect to athletic exhibitions sponsored by the South Carolina schools. We, therefore, deem it proper that we add our voice to that of the officials of the Georgia institutions in urging upon this Court the invalidity of the Federal taxation as here applied.

ARGUMENT

It is not our purpose to attempt any lengthy discussion of the principles and precedents pertaining to intergovernmental tax immunity, admittedly one of the most intricate, delicate and involved of all problems in the field of constitutional law. This principle, necessarily implied under the Constitution in order to maintain essential freedom of our dual governments in performing their functions, has been landmarked by such cases as *McCulloch v. Maryland,* 4 Wheat, 316, 4 L. Ed., 579; *Weston v. Charleston,* 2 Pet., 449, 7 L. Ed., 481, *Indian Motorcycle Co. v. United States,* 283 U. S., 570, *Rogers v. Graves,* 299 U. S., 401, and *James v. Dravo Contracting Co.,* 82 L. Ed., 125. The situations calling for application of this principle have been varied and its corollaries are therefore numerous; but we think the present case comes within the most basic statement of the principle, *i. e.* that no state can by taxation burden or impede the United States in the exercise of its delegated powers and that the United States cannot by taxation burden or impede any state in the exercise of its governmental

powers. We have carefully examined the opinions of this Court in *James v. Dravo Contracting Co., supra; Helvering v. Mountain Producers Corp.,* 82 L. Ed., 615 and *Helvering v. Therrell,* 82 L. Ed., 541, decisions considered, and unquestionably properly so, as definitely limiting certain phases of the tax immunity that have hitherto been indulged in under the former and broader decision. The limitations of none of these recent decisions have, we believe, any application to the question now presented. In all of them the principle is inherent that any taxation by one of our two governmental systems burdening the exercise of governmental functions by the other cannot be sustained.

As we see it the primary question involved in the case at bar is one simple in statement and straightforward in analysis. It is whether the activity of a state educational institution in conducting athletic contests to which admissions are sold is a governmental activity or a private activity. If the Georgia colleges and the South Carolina colleges are, in taking part in intercollegiate sports events and making charges to the public for witnessing such events, carrying out a part of a program which is essentially governmental in its nature, the Federal government cannot constitutionally levy a tax that will tend to burden such activity. On the other hand, if the officials of the Georgia colleges and the officials of the South Carolina colleges are in sponsoring such intercollegiate contests, taking part in a business venture—the business of amusing or entertaining the public—the activity is a private and proprietary one and no precept of constitutional law is offended by a Federal tax upon it. This is admitted to follow under the leading case of *South Carolina v. United States,* 199 U. S., 437.

It is our position that the former is the true legal aspect of the matter and that when the officials of the University of Georgia and Georgia Tech, as well as the officials of the State institutions of South Carolina, hold

intercollegiate football games and charge admissions therefor they are performing an integral part of a governmental function rather than a proprietary function.

Higher Education is a Governmental function. We do not believe that this proposition, the first step in a logical analysis of the question here presented, requires defense or discussion.

Athletic training is an integral part of higher education. This proposition is no longer seriously questioned in our modern society. In the opinion of most of our present day educators a healthy body and a personality tempered by sports are looked upon as prerequisites to any true development of our youth, regardless of how firm is the belief that mental development is the primary objective of our schools. There have been numerous decisions by our various State Courts as to whether athletics so come within the scope of educational activities as to make their promotion properly considered under the law as a governmental function. These cases involve liability for damages incurred while engaging in athletics (*Mokovick v. School District,* 177 Minn., 446, 225 N. W., 292; *Spencer v. School District,* 121 Ore., 511, 254 Pac., 357); the law of eminent domain as applied to the acquisition of property to be used for athletic purposes (*School District No. 56 v. Superior Court of Chelan County,* 69 Wash., 189, 124 Pac., 484); and exemption from taxation (*German Gymnastic Assoc. v. City of Louisville,* 117 Ky., 958, 80 S. W., 201). In all of them the promotion of athletics in a state educational system was held to be a governmental function.

Intercollegiate contests are an integral part of athletic training. As in perhaps all human activities, the attainment of proficiency in a sport rests upon an assurance that proficiency if attained will be acknowledged. Were there no opportunity for a young man in college to attain such proficiency in his chosen sport as to be selected on his school

team, the desire to take part in athletic activities would be greatly lessened; and were there no opportunity for the school team to demonstrate its proficiency in friendly rivalry with other colleges the desire of winning a place on such team would be equally diminished. Intercollegiate contests provide the zest for physicial development. It is true that our schools of higher education foster various and varied intramural sports, but we believe that the inspiration for all this activity, the cause *sine qua non* of its existence is competitive intercollegiate contests.

We might even say that the fact that such intercollegiate contests, particularly in the major sports, are engaged in before large gatherings of spectators, partisan in their feelings and laud in their applause, is in itself an incentive for activities in all sports.

Charging the public for admissions to athletic contests is a necessary adjunct to intercollegiate sports activities. We come now to what is perhaps the crux of the question. The Government apparently contends that although we are correct in what we have said so far and there can no successful athletic program without intercollegiate contests, the fact that the public is invited to attend such contests and is charged admission for the privilege of doing so changes what would otherwise be a proper educational function into a selling of entertainment for profit. We believe that the appellees in the case at bar have established in the record below that the charging of admissions to such contests, particularly football games, is necessary, not only to make the game of football itself, admittedly our most popular American collegiate game, self-supporting, but also to provide funds for the rest of the athletic program. It is equally true in our South Carolina schools that our general athletic activities would be so curtailed as to make them of little use were revenues from intercollegiate football games to be cut off. We think this is perhaps more true in the South than in other sections. Football is in this section

our only major sport, the only sport in which a sufficiently large number of people are interested to afford any substantial revenue at all. We, as do the Georgia schools, charge admissions to our football games so that a varied and useful athletic program can exist in our colleges, so that there can be baseball, track, basketball and all the various intramural sports, and so that there may be available facilities for some sport of which every man in college can take advantage if he so desires. We do not think that it can be said that we hold large intercollegiate contests for the purpose of providing entertainment for the public and profit to ourselves when the revenue which we derive therefrom is so necessary to the maintenance of our general athletic program. The mere fact that admissions are charged and profits sometimes made cannot have the effect of making an activity otherwise governmental, non-governmental or proprietary in nature: *People v. Graves,* 299 U. S., 401 and *Brush v. Commissioner,* 300 U. S., 352.

We have argued that physical training is a necessary part of our educational system, that intercollegiate contests are a necessary part of physical training and that the charging of admissions is a necessary part of intercollegiate contests. However, all that we need to show is that in the consideration of the State authorities in charge of our institutions of higher learning these propositions are true. Believing them to be true, they have acted upon them, and we do not believe the Federal Government can be said to be properly respecting the sovereignty of the State when it denies to the State authorities in control of our educational system the right to say what are and what are not proper activities in a program of State education.

The Government argues, and the dissenting Judge in the Circuit Court of Appeals adopted the position, that, even if the charging of admissions for intercollegiate contests is in the exercise of a governmental function, the federal tax is still collectible because it is levied not against the State institution but against the purchasers of tickets.

That if a tax by one government does tend to burden the proper governmental actions of the other, the fact that the tax is by the terms of the taxing statute to be paid by one with whom the Government deals rather than the Government itself is immaterial, is sufficiently established by the decisions of this Court in *Panhandle Oil Co. v. Knox,* 277 U. S., 218, and *Indian Motorcycle Co. v. United States,* 283 U. S., 570. Likewise, it is true that where a tax is deemed a direct levy upon a sovereign or one of its instrumentalities in respect to the operation of a governmental function there can be no regard to the extent of the burden. *Indian Motorcycle Co. v. United States, supra,* and cases cited therein.

We would apply exactly the converse of the Government's argument and say that even if the holding of athletic contests to which admissions are charged be not a proper governmental function, still the collection of Federal admission taxes is invalid if agencies of the State Government are compelled to act as tax collectors for the Federal Government. The collection of Federal taxes is certainly a Federal function and a duty of the proper Federal officers, and the burden of this collection cannot be by Federal statute placed upon State officials or agencies. *Kentucky v. Dennison,* 24 How., 66, 16 L. Ed., 717.

CONCLUSION

In conclusion we earnestly submit that when it is made to appear that officials of State institutions of higher learning consider it proper to include physical training in their program of education, and public contests for which admissions are charged in their program of athletics; the conducting of such exhibitions is established as an integral part of a governmental function and no taxation by the Federal Government which interferes with this function should be permitted. We therefore join with the Regents

of the University system of Georgia in asking that the decision below be affirmed.

Respectfully submitted,

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Stone J. p. 1.

SUPREME COURT OF THE UNITED STATES.

No. 882.—October Term, 1937.

Marion H. Allen, Collector of Internal Revenue for the District of Georgia, Petitioner,
vs.
Regents of the University System of Georgia.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 23, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The question on the merits is whether the exaction of the federal admissions tax, in respect of athletic contests in which teams representing colleges conducted by the respondent participate, unconstitutionally burdens a governmental function of the State of Georgia. The petition also challenges the respondent's ability to maintain a suit to enjoin the collection of the tax and to substitute as defendant the successor in office of the Collector originally impleaded. The court below decided all the questions involved against the petitioner.[1] Because of their importance we granted certiorari.

Section 500(a)(1) of the Revenue Act of 1926,[2] as amended by Section 711 of the Revenue Act of 1932[3] imposes "a tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place . . . to be paid by the person paying for such admission; . . .".[4] Subsection (d) commands that the price (exclusive of the tax to be paid by the person paying for admission) at which every admission ticket is sold shall be con-

[1] The defendant in the District Court was W. E. Page, the petitioner's predecessor in office. That court dismissed the bill. 10 F. Supp. 901. The Circuit Court of Appeals reversed. 81 F. (2d) 577. After answer and a hearing on the merits the District Court awarded an injunction. 18 F. Supp. 62. The Circuit Court of Appeals permitted the substitution of the petitioner for Page and affirmed the decree by a divided court. 93 F. (2d) 887.

[2] c. 27, 44 Stat. 9, 91; U. S. C. Tit. 26, §§ 940-944.

[3] c. 209, 47 Stat. 169, 271; U. S. C. Tit. 26, § 940(a)(2).

[4] Exemptions touching admissions of certain persons and all admissions to specified types of entertainment or exhibitions are not involved. Subsection (c), 47 Stat. 271.

spicuously printed, stamped, or written on the face or back of that portion of the ticket which is to be taken up by the management and imposes a penalty for failure to comply with its terms. Section 502 requires the person receiving payments for admissions to collect the tax and make return in such form as the Commissioner of Internal Revenue may prescribe by regulation. Section 1102(a)[5] imposes the duty on persons who collect the tax to keep records and render statements, under oath, and to make returns as required by the Secretary of the Treasury. Section 1114[6] (b) and (d) fixes penalties for failure to collect or pay over and subsection (e) provides for the personal liability of one collecting the admission charge and for distraint by the Collector of Internal Revenue for taxes and penalties. Section 607 of the Revenue Act of 1934[7] requires the person charged with the collection of the tax to hold the amount collected as a special fund in trust for the United States, confers the right to assess him with the amount so collected and withheld, including penalties, and, in connection with R. S. 3187,[8] authorizes the Collector of Internal Revenue to distrain therefor.

The respondent is a public corporation, created by Georgia as an instrumentality of the State, having control and management of The University of Georgia and the Georgia School of Technology. Athletics at these institutions are conducted under the respondent's authority by two corporations, the University of Georgia Athletic Association and the Georgia Tech. Athletic Association. The expense of physical education and athletic programs at each school is defrayed almost entirely from the admission charges to athletic contests and students' athletic fees collected for the purpose. During September and October 1934 football games were played at the institutions, for which admissions were charged and collected by the associations. Each ticket showed on its face the admission price, the amount of the tax, and the total of the two, and also carried the following printed notice:

"The University of Georgia [or Georgia School of Technology] being an instrumentality of the government of the State of Georgia, contends that it is not liable for any admission tax. The amount stated as a tax is so stated because the University is required to do

[5] 44 Stat. 112; U. S. C. Tit. 26, § 960.
[6] 44 Stat. 116; U. S. C. Tit. 26, §§ 494, 856, 921.
[7] c. 277, 48 Stat. 680, 768; U. S. C. Tit. 26, Sec. 1551.
[8] U. S. C. Tit. 26, § 1580.

so by Treasury regulations pending a decision as to its liability in this respect. This amount is collected by the University as a part of the admission and will be retained as such unless it is finally determined that the University is itself liable for the tax."

Each association deposited the total collected as the disputed tax in a separate bank account, apart from its other funds, but made no return thereof. The Collector prepared returns for the amounts. In consequence of the associations' neglect to pay the amounts so returned, the Commissioner assessed each association in the amount shown by return made for it and certified the assessments to the Collector who made demands for payment. These were ignored and the Collector filed liens, issued warrants, and levied upon the deposit accounts. The respondent then brought suit in which it prayed a decree that, as an agency of the State performing an essential governmental function in the conduct of the games, it was immune from the tax, and sought injunctions, temporary and permanent, to restrain the Collector from proceeding further to collect the sums demanded. From a decree awarding a final injunction the Collector appealed but, pending appeal, resigned and, before the hearing, died. Over objection the Circuit Court of Appeals ordered the petitioner substituted as appellant and affirmed the decree. We are of opinion that the court below rightly decided the procedural questions but erred as to the merits.

First. If the suit was maintainable against his predecessor in office the substitution of petitioner was lawful. We are not unmindful of the principle that suits against officers to restrain action in excess of their authority or in violation of statutory or constitutional provisions are in their nature personal and that a successor in office is not privy to his predecessor in respect of the alleged wrongful conduct.[9] As a result of the inconvenience resulting from the lack of power to substitute one who succeeded to the office of an alleged offending official, to which this court has called attention,[10] Congress adopted the Act of February 13, 1925,[11] which provides:

" . . . where, during the pendency of an action, suit, or other proceding brought by or against an officer of the United

[9] Pennoyer v. McConnaughy, 140 U. S. 1, 10; United States ex rel. Bernardin v. Butterworth, 169 U. S. 600, 603-604; Philadelphia Company v. Stimson, 223 U. S. 605, 620-621; Irwin v. Wright, 258 U. S. 219, 222.

[10] See Ex parte La Prade, 289 U. S. 444, 456-459.

[11] c. 229, 43 Stat. 936, U. S. C. Tit. 28, Sec. 780.

States . . . and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, ...".

The motion to substitute the petitioner asserted that, unless restrained, he would continue in the course pursued by his predecessor. The answer did not deny this allegation but relied upon the claim that the present Collector is not privy to the acts of the former one. In *Ex parte La Prade*, 289 U. S. 444, this court reserved the question whether in such a situation the successor might be substituted. As the present case is within the letter of the Act and within the inconvenience intended to be obviated by its adoption, the substitution was properly permitted.

Second. If the tax, the collection of which was threatened, constituted an inadmissible burden upon a governmental activity of the State, the circumstances disclosed render the cause one of equitable cognizance and take it out of the prohibition of R. S. 3224.[12] The respondent has long been of opinion that exaction of the tax in respect of games played under the auspices of The University of Georgia and the Georgia School of Technology constitutes an unconstitutional burden upon an essential governmental activity of Georgia. At first the respondent collected the tax as required by the Act, paid it over to the Treasury, and made claim for refund. The claim was rejected on the ground that the tax was paid by the patron of the game, and that the athletic associations and the respondent were mere collecting agents having no interest in the fund which would justify repayment to them if it had been illegally collected. Believing the basis of the Commissioner's refusal to refund was sound,[13] the respondent then resorted to the expedient of collecting the amount of the tax under the reservation printed upon the tickets.

The bill, after reciting the facts as above summarized, alleges that the statute imposes a tax upon the individuals who purchase

[12] U. S. C. Tit. 26, § 1543.

[13] Compare Shannopin Country Club *v.* Heiner, 2 F. (2d) 393; Lafayette Worsted Co. *v.* Page, 6 F. (2d) 399; Union Pac. Ry. *v.* Bowers, 33 F. (2d) 102; Wourdack *v.* Becker, 55 F. (2d) 840; but see Builders' Club *v.* United States, 14 F. Supp. 1020.

ts, but, properly construed, is inapplicable to those purchasing
ts to the football games in question. It further asserts that, in
ect of those games, neither the respondent nor the athletic as-
tions collected any tax from purchasers of admissions; that if
tatute be construed to justify the Collector in seeking to force
ondent to pay sums representing alleged taxes due from nu-
us individuals it is unconstitutional as an attempt to interfere
and control and to burden the State's educational activities
unlawfully to impose on the State government the duty of col-
ng taxes for the federal government; that the action of the
ioner in issuing warrants of distraint is either an attempt to
ct from respondent taxes alleged to be due from various in-
luals, or to impose upon the respondent penalties, criminal and
tive in nature.

he petitioner insists the bill shows the tax was in fact collected
the patrons of the games, and the allegation that no tax was
cted is a mere conclusion of law which the court should ignore;
the trial court was without jurisdiction to determine in this
for injunction whether or not taxes had been collected by
ondent; that the Revenue Act imposes no liability for the tax
the vendor of the tickets who fails to collect, although it does
se a penalty for wilful failure to collect the tax and other
lties; that, as the respondent collected the tax, it has no stand-
n its capacity as a collecting agent to deny the validity of the
tion, and, as a collecting agent, could not create a right to
t collection by the government by forcing a stipulation upon
hasers of tickets that the amount collected should belong to
agent if it were able to defeat the government; that, as such
t, respondent has no interest adverse to the United States; that
tipulation in question did not amount to an assignment of a
t purchaser's claim for refund or, if it did, the purchaser has
eby lost his right to recover the tax by reason of the prohibition
ssignment of claims against the United States embodied in
. 3477;[14] that respondent or the athletic associations would
had an adequate remedy at law for recovery of the amounts
sed against them had they paid the assessments; and finally
R. S. 3224[15] prohibits the issue of an injunction against col-
on.

J. S. C. Tit. 31, § 203.

[15] "No suit for the purpose of restraining the assessment or collection of
ax shall be maintained in any court." U. S. C. Tit. 26, § 1543.

To these contentions respondent replies that while it placed the required information on the ticket and segregated the equivalent of the tax from the proceeds of tickets sold to avoid the imposition of penalties on its personnel, the notation on the tickets shows that it did not undertake to collect and did not in fact collect the tax; that, by refusal to collect, it took itself out of the category of an agent who voluntarily acted on behalf of the government; that, while the statute places no liability upon respondent for the tax as such, it imposes upon the respondent civil and criminal penalties for refusal to collect it; that respondent is not an assignee of the claims of its patrons, but, if the tax is invalid, is owner in its own right of the entire amount paid by each purchaser; that respondent has no remedy at law because if it had paid the tax out of its own funds it could not have claimed refund of payment thus voluntarily made for its patrons' accounts; that State officials may not be required to collect an illegal tax as a condition precedent to contesting its validity; that Section 3224 has no application to this suit.

The dispute as to the propriety of a suit in equity must be resolved in the light of the nature of the controversy. The respondent in good faith believes that an unconstitutional burden is laid directly upon its transactions in the sale of licenses to witness athletic exhibitions conducted under authority of the State and for an essential governmental purpose. The State is entitled to have a determination of the question whether such burden is imposed by the statute as construed and applied. It is not bound to subject its public officers and their subordinates to pains and penalties criminal and civil in order to have this question settled, if no part of the sum collected was a tax, and if the assessment was in truth the imposition of a penalty for failure to exact a tax on behalf of the United States. And if the respondent is right that the statute is invalid as applied to its exhibitions, it ought not to have to incur the expense and burden of collection, return, and prosecution of claim for refund of a tax upon others which the State may not lawfully be required to collect. These extraordinary circumstances we think justify resort to equity.

What we have said indicates that R. S. 3224, *supra,* does not oust the jurisdiction. The statute is inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at

law.[16] This is such a case, for here the assessment is not of a tax payable by respondent but of a penalty for failure to collect it from another. The argument that no remedy need be afforded the respondent is bottomed on the assumption that it is a mere collecting agent which cannot be hurt by collecting and paying over the tax; but this argument assumes first, that respondent did in truth collect a tax and, second, that the imposition of the tax on the purchase of admissions cannot burden a state activity. This is arguing in a circle, for these are the substantial matters in controversy. We hold that the bill states a case in equity as, upon the showing made, the respondent was unable by any other proceeding adequately to raise the issue of the unconstitutionality of the Government's effort to enforce payment.

Third. We come then to the merits. For present purposes we assume the truth of the following propositions put forward by the respondent: That it is a public instrumentality of the State government carrying out a part of the State's program of public education; that public education is a governmental function; that the holding of athletic contests is an integral part of the program of public education conducted by Georgia; that the means by which the State carries out that program are for determination by the State authorities, and their determination is not subject to review by any branch of the federal Government; that a state acvitity does not cease to be governmental because it produces some income; that the tax is imposed directly on the State activity and directly burdens that activity; that the burden of collecting the tax is placed immediately on a State agency. The petitioner stoutly combats many of these propositions. We have no occasion to pass upon their validity since, even if all are accepted, we think the tax was lawfully imposed and the respondent was obligated to collect, return and pay it to the United States.

The record discloses these undisputed facts: The stadium of the University of Georgia has a seating capacity of 30,000, cost $180,000, and was paid for by borrowed money which is being repaid by the Athletic Association, whose chief source of revenue is admissions to the contests in the stadium. $158,000 of the amount bor-

[16] Miller *v.* Standard Nut Margarine Company, 284 U. S. 498, 509.

rowed has been repaid since the stadium was completed in 1929. The student enrollment is about 2400. Each student pays an annual athletic fee of $10.00 which confers the privilege of free admission to all the school's athletic events. All admissions collected, and the tax paid on them, are paid by the general public, none by the students.[17] The total receipts of the Athletic Association from all sources for the year ending August 31, 1935, were $91,620.25 of which $71,323.27 came from admissions to football games.

The stadium of the Georgia School of Technology has a seating capacity of 29,000. It cost $275,000 and was paid for by a gift of $50,000 and from admissions charged and student fees. The enrollment is about 2,000 students each of whom pays an annual athletic fee of $7.50 which gives the privilege of free admission to all games. All admissions collected, and the tax paid on them, are paid by the general public, none by the students.[17] The total receipts of the Athletic Association for the six months ended December 31, 1934, were $119,436.75 of which $74,168.51 came from admissions to football games.

It is evident that these exhibition enterprises are comparatively large and are the means of procuring substantial aid for the schools' programs of athletics and physical education. In final analysis the question we must decide is whether, by electing to support a governmental activity through the conduct of a business comparable in all essentials to those usually conducted by private owners, a state may withdraw the business from the field of federal taxation.

When a state embarks in a business which would normally be taxable, the fact that in so doing it is exercising a governmental power does not render the activity immune from federal taxation. In *South Carolina* v. *United States*, 199 U. S. 437, it appeared that South Carolina had established dispensaries for the sale of liquor and prohibited sale by other than official dispensers. It was held that the United States could require the dispensers to take licenses and to pay license taxes under the Internal Revenue laws applicable to dealers in intoxicating liquors, and this notwithstanding the State had established the dispensary system in the valid exercise

[17] Student athletic fees are not treated as admissions subject to the tax. See Cumulative Bulletin XI-2 (July-December 1932) p. 522.

of her police power. In *Ohio* v. *Helvering,* 292 U. S. 360, it was shown that Ohio, in the exercise of the same power, had created a monopoly of the distribution and sale of intoxicating liquors through stores owned, managed, and controlled exclusively by the State. It was sought to enjoin the Commissioner of Internal Revenue and his subordinates from enforcing against the State, her officers, agents, and employes, penalties for the nonpayment of federal excises on the sale of liquor. Relief was denied and the views expressed in the *South Carolina* case were reaffirmed. In *Helvering* v. *Powers,* 293 U. S. 214, the court found that Massachusetts, in the exercise of the police power, had appointed a Board of Trustees to operate a street railway company's properties for a limited time. It was held that though the trustees were State officers, their salaries were subject to federal income tax because the State could not withdraw sources of revenue from the federal taxing power by engaging in a business which went beyond usual governmental functions and to which, by reason of its nature, the federal taxing power would normally extend.

The legislation considered in *South Carolina* v. *United States, supra,* provided for a division of the profits of the dispensary system between the State treasury and cities and counties. Thus the enterprise contributed directly to the sustenance of every governmental activity of the State. In the present instance, instead of covering the proceeds or profits of the exhibitions into the State treasury, the plan in actual operation appropriates these monies in ease of what the State deems its governmental obligation to support a system of public education. The difference in method is not significant. The important fact is that the State, in order to raise funds for public purposes, has embarked in a business having the incidents of similar enterprises usually prosecuted for private gain. If it be conceded that the education of its prospective citizens is an essential governmental function of Georgia, as necessary to the preservation of the State as is the maintenance of its executive, legislative, and judicial branches, it does not follow that if the State elects to provide the funds for any of these purposes by conducting a business, the application of the avails in aid of necessary governmental functions withdraws the business from the field of federal taxation.

Under the test laid down in *Helvering* v. *Gerhardt* [decided this day] however essential a system of public education to the existence of the State, the conduct of exhibitions for admissions paid by the public is not such a function of state government as to be free from the burden of a non-discriminatory tax laid on all admissions to public exhibitions for which an admission fee is charged.

The opinion in *South Carolina* v. *United States, supra,* at pages 454-457, points out the destruction of the federal power to tax which might result from a contrary decision.[18]

Moreover the immunity implied from the dual sovereignty recognized by the constitution does not extend to business enterprises conducted by the States for gain. As was said in *South Carolina* v. *United States, supra,* at p. 457: "Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it." Compare *Helvering* v. *Therrell,* No. 128, Oct. T. 1937. The decree is

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

Mr. Justice BLACK concurs in the result.

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[18] "Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down." (p. 454.)

"The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty." (p. 455.) (Compare Board of Trustees *v.* United States, 289 U. S. 48, 59.)

"Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government." (p. 455.)

SUPREME COURT OF THE UNITED STATES.

No. 882.—October Term, 1937.

Marion H. Allen, Collector of Internal Revenue for the District of Georgia, Petitioner,
vs.
Regents of the University System of Georgia.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 23, 1938.]

Mr. Justice Reed concurs in the result.

Except for the holding that injunction is a proper remedy to test the position of the Regents, I agree with the opinion of the Court. As even a small breach in the general scheme of taxation gives an opening for the disorganization of the whole plan, it seems desirable to express dissent from the conclusion that the Regents may utilize the summary remedy of injunction, over the objection of the Government, as a means of testing the applicability of a tax law to them.

The facts set out in the opinion of the circumstances and agreement under which the money threatened to be distrained was collected make it quite clear, it seems to me, that the Regents collected tax moneys from the spectators. Any allegation in the petition to the contrary is an erroneous conclusion of law. The Collector sought to cover this money into the Treasury. Section 502(a) of the Revenue Act of 1926[1]; section 607 of the Revenue Act of 1934[2] and section 3224 of the Revised Stat-

[1] Sec. 502(a). Every person receiving any payments for such admission, dues, or fees shall collect the amount of the tax imposed by section 500 or 501 from the person making such payments. Every club or organization having life members shall collect from such members the amount of the tax imposed by section 501. Such persons shall make monthly returns under oath, in duplicate, and pay the taxes so collected to the collector of the district in which the princial office or place of business is located. (U. S. C., Title 26, Sec. 955, 956.)

[2] Sec. 607. Enforcement of Liability for Taxes Collected. Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay such tax over to the United States, the amount of the tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid

utes[3] make it clear that no injunction will lie to restrain such action.[4]

Section 3224 was enacted in 1867 and until recent years was followed by the courts without deviation. Exceptions were made to protect taxpayers against collection of penalties.[5] In an exceptional case of "special and extraordinary" circumstances,[6] where a "valid . . . tax could by no legal possibility have been assessed against respondent . . ." this Court permitted an injunction. "Special and extraordinary" circumstances have multiplied. Here the lower court found them "demonstrated by the fact that the Regents had actually paid the tax in former years, and filed a claim for refund which was denied on the ground that they had not borne the burden of any part thereof." It may be assumed, and petitioner admits, that respondents may not pay the moneys and then sue to recover them. The fallacy underlying the opinion of the Court is the assumption that some remedy is necessary. Respondents, being merely collectors of tax moneys, are not entitled either to enjoin collection of these moneys or to pay and sue to recover them.

There is no reason why the State of Georgia should risk or ask its agents to risk penalties to determine whether this tax is collectible. Respondents would lose nothing by collecting the tax and turning it over to the United States. If they desire to stand upon their own conception of the law and refuse to collect the tax, they must take the risks of such action. Every other taxpayer or collector of admission taxes must make the same choice.

The prompt collection of revenue is essential to good government. Summary proceedings are a matter of right.[7] The Government has been sedulous to maintain a system of corrective

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in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose. (U. S. C., Title 26, Sec. 1551.)

[3] Sec. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. (U. S. C., Title 26, Sec. 1543.)

[4] Gouge *v.* Hart, 250 Fed. 802 (W. D. Va.), appeal dismissed, 251 U. S. 542; Ralston *v.* Heiner, 24 F. (2d) 416 (C. C. A. 3d); Calkins *v.* Smietanka, 240 Fed. 138 (N. D. Ill.); Seaman *v.* Guaranty Trust Co. of New York, 1 F. (2d) 391 (S. D. N. Y.).

[5] Lipke *v.* Lederer, 259 U. S. 557; Regal Drug Co. *v.* Wardell, 260 U. S. 386.

[6] Miller *v.* Nut Margarine Co., 284 U. S. 498.

[7] Cheatham *v.* United States, 92 U. S. 85, 88, 89.

stice.[8] Any departure from the principle of "pay first and tigate later" threatens an essential safeguard to the orderly functoning of government. Here an injunction is approved when the etitioner below had little more legitimate interest in the collection the tax than a curiosity to know whether the customers of its thletic spectacles, the real taxpayers, were constitutionally subect to such an exaction.

I am authorized to say that Mr. Justice STONE concurs in this pinion. Mr. Justice BLACK concurs in this opinion except in so far it approves the reasoning of the Court on the question of State mmunity from interference by Federal taxation.

[8] Compare Anniston Mfg. Co. *v.* Davis, 301 U. S. 337.

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Mr. Justice Stone, concurring in the result.

Congress, by R. S. § 3224, has declared that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." While I agree with the decision of the Court on the merits, I am not persuaded that this statute does not mean what it says, or that the suit is not one to restrain collection of the tax. I can only conclude, as I did in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 511, that the statute deprived the district court of jurisdiction to entertain respondent's suit, and that the judgment should be reversed with direction that the cause be dismissed.

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Mr. Justice Butler, dissenting.

I am of opinion that the District Court had jurisdiction.

So far as concerns the validity of the tax, the University is the State. It is an instrumentality carrying on the State's program of public education. The holding of the athletic contests in question is an integral part of that program and does not cease to be such because it produces income. The tax is imposed directly on and burdens that activity of the State. The Court assumes the facts above stated and decides the case on that basis. The tax is laid on the charge paid for admission, is to be borne by the person paying for admission and is to be collected by the State and handed over to the United States. It is hard to understand how the collection by the State of fees for the privilege of attendance brings, even for the purpose of federal taxation, its work of education to the level of selling intoxicating liquor (*South Carolina* v. *United States*, 199 U. S. 437. *Ohio* v. *Helvering*, 292 U. S. 360) operating a railway (*Helvering* v. *Powers*, 293 U. S. 214) or conducting any other commercial activity. The tax seems plainly within the rule of state immunity from federal taxation as hitherto understood and applied. I would affirm the judgment of the Circuit Court of Appeals.

Mr. Justice McReynolds concurs in this opinion.